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No. 267

In the Supreme Court of the United States

OCTOBER TERM, 1950

J. J. O'LEARY, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, PETITIONER

v.

BROWN-PACIFIC-MAXON, INC., A CORPORATION, AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court for the Western District of Washington, Northern Division, did not render an opinion. Its Findings of Fact and Conclusions of Law are set forth at R. 13–14. The opinion of the Court of Appeals for the Ninth Circuit (R. 64–65) is reported at 182 F. 2d 772.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1950 (R. 66). The petition for a writ of certiorari was filed on August 24, 1950, and was granted on October 16, 1950 (R. 68). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

While using the facilities of a recreation center maintained and supervised by his employer at Guam, the deceased employee responded to a call for help from a person drowning in the waters adjacent to the center and lost his life in attempting the rescue. The Deputy Commissioner, under the Longshoremen's and Harbor Workers' Compensation Act as extended to Guam by the Defense Bases Act, made a finding that the employee's death arose out of and in the course of his employment.

The question presented is whether, upon review of an order of the Deputy Commissioner awarding compensation to the deceased's dependent mother, the court below was free to make an independent appraisal of the evidence and to substitute its judgment for that of the Deputy Commissioner which had support in the law and the evidence.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U. S. C. 901, *et seq.*)

and of the Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U. S. C. 1651, *et seq.*) are set forth in the Appendix, *infra*, pp. 29–32.

STATEMENT

This action was brought on March 2, 1949, by respondents, Brown-Pacific-Maxon, Inc. (the "employer") and Hartford Accident and Indemnity Company (the "insurance carrier"), to set aside and enjoin the enforcement of a compensation award of $9.38 per week made by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Act to the surviving dependent mother of John Valak, a deceased employee of Brown-Pacific-Maxon (R. 2–11).

At the time of his death, Valak was employed at the Island of Guam, where the corporation was performing certain construction contracts for the United States Navy (R. 2, 3). This work was covered by the workmen's compensation provisions of the Longshoremen's and Harbor Workers' Act, as extended by the Defense Bases Act (R. 2, 8, 19).

A recreation center, called Camp Ethridge, was maintained and supervised by the employer at Guam for the benefit of "any civilians on the island, providing they were employed by the contractor" (R. 40, 41, 64). Among the facilities provided at the center were a swimming pool, ping-pong tables and a club where employees could get food (R. 41, 64). A manager, life

guards, security police, and first-aid personnel were among those stationed at the center in Brown-Pacific-Maxon's permanent employ (R. 41, 42, 48). Through its Recreation Department, the employer also provided a bus for the free transportation of its employees to and from the recreation center (R. 9, 52, 53).

On November 9, 1947, Valak was making use of the recreational facilities at the center provided by his employer (R. 9). As he and other employees were preparing to leave the recreation center by company bus, cries for help were heard from off-shore reefs (R. 9, 65). Valak and others went to the assistance of the persons in distress, and he lost his life by drowning in the attempted rescue (R. 9, 65). Following this unsuccessful attempt, a rescue squad was organized by the recreation center manager and the superintendent, who was also employed by Brown-Pacific-Maxon, and a number of other persons who had also attempted the rescue were saved by the guards and security police (R. 48, 51, 65).

At the hearing before the Deputy Commissioner on a claim for death benefits by Valak's dependent mother, the employer and insurance carrier contended that Valak's death "did not occur in the course of employment under the Longshoremen's and Harbor Workers' Act" (R. 19, 20). The Deputy Commissioner, however, found, as a fact, that at the time of his death Valak was using the recreational facilities sponsored and

made available by the employer for its employees and that this use was an incident of his employment (R. 9). Accordingly, he found that Valak's death arose out of and in the course of his employment and awarded his dependent mother compensation of $9.38 per week (R. 10).

Respondents attacked this award by bringing suit in the district court in which they renewed their assertion that the employee's death did not arise out of or in the course of his employment (R. 6). After considering the evidence given before the Deputy Commissioner, which had been made a part of the complaint, the district court found that there was "substantial evidence contained in the hearings * * * to sustain the compensation order" (R. 13). The district court, accordingly, granted the Deputy Commissioner's motion to dismiss the complaint, and confirmed the compensation award (R. 13–16).

On appeal, the court below, without passing upon the substantiality of the evidence before the Deputy Commissioner or the finding of the district court that there was substantial evidence to sustain the award, made an independent appraisal of the evidence and substituted its own judgment for that of the Deputy Commissioner (R. 64–65). Although it agreed that the use of facilities provided by an employer for his employee's recreation "is an incident of his employment," the court refused to "agree with the commissioner"

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that the attempted rescue was incidental to the use of the recreation facilities (R. 65). Substituting its own conclusion for that of the Deputy Commissioner, it held that the rescue attempt which resulted in Valak's death "was an act entirely disconnected from any use for which the recreational camp was provided and not in the course of Valak's employment" (R. 65). It therefore reversed the judgment of the district court sustaining the Deputy Commissioner's findings as supported by substantial evidence and set aside the compensation award (R. 65).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the Ninth Circuit erred:

1. In undertaking to determine, independently of the Deputy Commissioner's ultimate findings, whether Valak's death arose out of and in the course of his employment.

2. In holding that Valak's death did not arise out of and in the course of his employment, and in refusing to accord finality to the Deputy Commissioner's finding to the contrary.

3. In holding, as a matter of law, that the death of an employee while attempting to effect an emergency rescue in the course of using recreational facilities, furnished and supervised by his employer, cannot arise out of and in the course of his employment for compensation purposes under the Longshoremen's and Harbor Workers' Act.

4. In reversing the judgment of the district court and setting aside the compensation award.

SUMMARY OF ARGUMENT

I

The decision of the court below ignores the explicit instructions in this Court's decision in *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, as to the permissible scope of judicial review of a finding by the Deputy Commissioner, under the Longshoremen's and Harbor Workers' Act, that the employee's death arose out of and in the course of employment. The *Cardillo* case, as well as a long line of decisions of this and other federal courts, establishes that the only question before the reviewing court, when a Deputy Commissioner's finding is attacked, is whether the finding has support in the evidence and a reasonable basis in law. The lower federal courts, including the court below before the instant decision, have understood and consistently applied the limited scope of review described in the *Cardillo* and prior cases. The necessity for limited review to minimize litigation and thus facilitate the "prompt" and "inexpensive" settlement of compensation claims, one of the Act's main purposes, is apparent. The rule of limited review under the Longshoremen's Act is but one illustration of the traditional doctrine, of widespread application, that an administrative finding by the agency charged with the duty of making the

initial determination will be upheld if reasonable factual and legal support exists for the result.

II

The Deputy Commissioner's finding in the instant case is supported by ample evidence, has a reasonable basis in law, and, therefore, should have been sustained. The deceased employee's use, at the time when he responded to the emergency, of recreation facilities provided and supervised by his employer at Guam, thousands of miles from the United States, was admittedly an incident of his employment. It may reasonably be assumed from the later rescue activities of the camp manager, life guards and other regular employees that the employer was charged with the responsibility for the safety of persons in the area of the recreation center and the surrounding waters. The evidence therefore justified an inference that Valak's death while trying to rescue a person from drowning in the waters adjacent to the center was incident to his employment.

Moreover, even if it be thought that Valak was performing a purely personal act in attempting the rescue, many workmen's compensation decisions hold that performance by an employee of a personal act, when injured, cannot deprive him of workmen's compensation benefits. So long as the employee acts normally in a given situation, his response to a purely personal need itself constitutes an incident of his employment rather

than a departure from it. An employee does not forfeit compensation benefits if injured while responding to the common sense requirements of an emergency situation, even though such a response does not render some service to the employer.

ARGUMENT

I

THE DEPUTY COMMISSIONER'S FINDING THAT VALAK'S DEATH AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT, IF SUPPORTED BY THE FACTS AND NOT FORBIDDEN BY LAW, IS CONCLUSIVE

In overturning the Deputy Commissioner's finding that Valak's death arose out of and in the course of his employment, the court below exceeded the proper scope of judicial review so clearly delineated in this Court's recent decision in *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, and in other decisions of this Court under the Longshoremen's Act. *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166, 169; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287; *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246; *Davis* v. *Department of Labor*, 317 U. S. 249; *L'Hote* v. *Crowell*, 286 U. S. 528, explained in *The Admiral Peoples*, 295 U. S. 649, 653–654. Despite the principle clearly established by those decisions—that the administrative finding, if supported by the evidence and not forbidden by law,

is binding on the reviewing court—the court below, after making its own evaluation of the evidence, displaced the Deputy Commissioner's judgment.

The *Cardillo* case presented the precise issue now before this Court. There, as here, after the Deputy Commissioner had found that the employee's death arose out of and in the course of his employment,[1] the lower court substituted its own determination to the contrary. In reversing, this Court eliminated all doubt as to the limitations on the reviewing court's function with respect to such an administrative finding. The Court emphasized that the judicial function "is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law." 330 U. S. 469, 478. In reiterating the narrow scope of judicial review, the Court pointed out that it was immaterial (1) that the basic facts

[1] As in other workmen's compensation laws, claims based on an "injury or death arising out of and in the course of employment" are compensable under the Longshoremen's and Harbor Workers' Compensation Act. Section 2 (2), Appendix, *infra*, p. 29. In the *Cardillo* case, the Deputy Commissioner's finding that the death so arose was made under the Longshoremen's Act as extended to employees of the District of Columbia. The similar finding by the Deputy Commissioner in the instant case was made pursuant to the Longshoreman's Act as extended by Section 1 of the Defense Bases Act so as to cover "employment * * *" under government contract in "any Territory or possession outside the continental United States" (Appendix, *infra*, p. 31).

from which the inference was drawn by the Deputy were not in dispute, (2) that those facts permitted the drawing of diverse inferences, (3) that the inference might be considered more legal than factual in nature, or (4) that the inference involves an application of a broad statutory term or phrase to a specific set of facts. 330 U. S. 469, 478. "The Deputy Commissioner alone", the Court observed, "is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." 330 U. S. 469, 478. The only question properly before the reviewing court is whether there is factual and legal support for the Deputy Commissioner's conclusion that the injury or death arose out of and in the course of the decedent's employment. "If there is factual and legal support for that conclusion," the Court's "task is at an end." 330 U. S. 469, 478.

The express terms of the Longshoremen's Act preclude any broader judicial review of the Deputy Commissioner's findings. *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 478. Section 19 of the Act, providing for the filing of a "claim for compensation," specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Appendix, *infra*, p. 30. Section 20 (a) requires that claims be treated as presumptively within the protection of the Act. Appendix,

infra, p. 30. Section 21 (b) provides that a compensation order may be suspended or set aside through injunction proceedings instituted in the federal district courts only "if not in accordance with law." Appendix, *infra*, p. 30.

Under these Sections, it is not only "course of employment" findings that are conclusive on the reviewing court. See *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469; *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162. The same conclusiveness attaches, for example, to a finding of the Deputy Commissioner as to the dependency of a claimant for compensation (*L'Hote* v. *Crowell*, 286 U. S. 528, explained in *The Admiral Peoples*, 295 U. S. 649, 653–654); to his finding that the employee had committed suicide and hence that compensation was not payable (*Del Vecchio* v. *Bowers*, 296 U. S. 280, 287); and also to his finding that a claimant was not "a member of a crew" and therefore entitled to compensation (*South Chicago Co.* v. *Bassett*, 309 U. S. 251).

The meaning of the *Cardillo* case has been well understood, and it has been expressly applied by the lower federal courts on numerous occasions to accord finality to findings of the Deputy Commissioner having a reasonable factual and legal basis. See, *e. g.*, *Hurley* v. *Lowe*, 168 F. 2d 553 (C. A. D. C.), certiorari denied, 334 U. S. 828; *Wetzel* v. *Britton*, 170 F. 2d 285 (C. A. D. C.); *Great American Indemnity Co.* v. *Britton*, 179 F. 2d 60 (C. A. D. C.); *Penn Stevedoring*

Corp. v. *Cardillo*, 72 F. Supp. 991 (S. D. N. Y.), affirmed, 165 F. 2d 789 (C. A. 2); *Kwasizur* v. *Cardillo*, 175 F. 2d 235 (C. A. 3), certiorari denied, 338 U. S. 880; *O'Loughlin* v. *Parker*, 163 F. 2d 1011 (C. A. 4), certiorari denied, 333 U. S. 868; *Lockard* v. *Parker*, 164 F. 2d 804 (C. A. 4); *Eschbach* v. *Contractors, Pacific Naval Air Bases*, 181 F. 2d 860 (C. A. 7). The court below itself has fully recognized, in other cases, the limitations on the scope of its review of compensation awards under the Longshoremen's and Harbor Workers' Act as extended by the Defense Bases Act. *C. F. Lytle Co.* v. *Whipple*, 156 F. 2d 155; *Liberty Mutual Insurance Co.* v. *Gray*, 137 F. 2d 926, 928. In the *Lytle* case, where, as here, it was contended that the employee's death did not arise out of and in the course of his employment, the court below stated that whether the inferences and conclusions drawn by the Deputy Commissioner "should meet the approval of a reviewing court, is outside the allowable scope of our inquiry." 156 F. 2d 155, 157. On this point, it expressly indicated that the *Voehl, South Chicago*, and *Parker* cases govern "with respect to the conclusiveness of findings on the question of whether a man was injured or killed while 'in the course of [his] employment.'" 156 F. 2d 155, 156, Note 2.

To deny such finality under judicial review to findings of a Deputy Commissioner under the

Longshoremen's Act would frustrate its chief purpose of providing a "prompt" and "inexpensive" method for the disposal of compensation claims. *See Crowell* v. *Benson*, 285 U. S. 22, 46.[2] If the courts are allowed to make and substitute their own judgment in each case as to the application of the general requirements of the Act to the endless variety of factual situations which may arise in the course of its administration, litigation, with its inevitable delays, would make "prompt" and "inexpensive" settlement impossible.

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[2] The provisions of the Act are geared to prompt disposition of claims. Compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14 (b)). Where the right to compensation is controverted and an award is made by a Deputy Commissioner, a penalty of twenty percent is assessed for failure to make compensation within ten days after payment is due (Sec. 14 (f)). *Candado Stevedoring Corp.* v. *Lowe*, 85 F. 2d 119 (C. A. 2); *Vigor Stevedore Co.* v. *Pillsbury*, 58 F. 2d 446 (C. A. 9). If the employer fails to make payment within thirty days after compensation is due, the Deputy Commissioner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15 (b)); agreements for compensation without the approval of the Commission are prohibited (Sec. 16); and the United States Attorney is directed to appear on behalf of the Deputy Commissioner and defend compensation orders (45 Stat. 480). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21 (b)).

This settled rule of limited review of administrative determination is, of course, not peculiar to the Longshoremen's Act. It has been regularly applied under other laws where the administrative finding, like the instant one, concerns the specific application of a broad statutory term, requiring evaluation of particular facts and circumstances, in a proceeding in which the agency administering the statute is charged with the duty of making the initial determination. This is true of such questions as whether a carrier is an "interurban electric railway" excluded from the coverage of the Railway Labor Act (*Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 186); whether a consumer is a "consumer-producer" exempted from the Bituminous Coal Act of 1937 (*Gray* v. *Powell*, 314 U. S. 402); whether coal is "bituminous coal" (*Sunshine Coal Company* v. *Adkins*, 310 U. S. 381, 390, 400); whether one carrier is directly or indirectly controlled by another so as to be excepted from the Communications Act of 1934 (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 145–146); whether newsboys are "employees" within the coverage of the National Labor Relations Act (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131); and whether a labor dispute was "in active progress" within the meaning of the Alaska Unemployment Insurance Act (*Unemployment Comm'n* v. *Aragon*, 329 U. S. 143). In each of these cases the determination

under the statute was dependent upon the application of an administrative judgment to substantially undisputed facts. And in each case this Court ruled that the power of the reviewing court is limited to ascertaining whether the administrative finding has a reasonable factual and legal basis. If the finding has "warrant in the record" and a "reasonable basis in law," it is final and conclusive on the courts. *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 154.

Whether the administrative determination involves a finding of fact or a mixed question of fact and law is unimportant. *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 478; *Marra Bros.* v. *Cardillo*, 154 F. 2d 357 (C. A. 3). No more material is the fact that the determination is not "the only reasonable one" and that it differs from the conclusion the court "would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153; *Hurley* v. *Lowe*, 168 F. 2d 553, 556 (C. A. D. C.), certiorari denied, 334 U. S. 828. What is significant, and all that is required to sustain the determination, is that there be reasonable factual and legal support for it. Once there is "found to be a rational basis for the conclusions approved by the administrative body," the judicial function is exhausted. *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282, 287; *Rochester Tel. Corp.* v. *United States*, 307 U. S.

125, 146; *Mounting and Finishing Co., Inc.* v. *McGoldrick*, 294 N. Y. 104.

Despite their obvious applicability, the decision of the court below completely ignores this Court's rulings in the *Cardillo* and other cases. It embarked on an independent appraisal of the evidence and reached its own determination as to whether Valak's death arose out of and in the course of his employment. In so doing, we believe the court was clearly in error. There can be little question that there is ample support in the facts and the law for the Deputy Commissioner's determination that Valak's injury arose out of and in the course of his employment.

II

THE DEPUTY COMMISSIONER'S FINDING IS SUPPORTED BY AMPLE EVIDENCE AND HAS A REASONABLE BASIS IN LAW

A. *There was ample basis in the record for the Deputy Commissioner's finding.*—The basic facts found by the Deputy Commissioner, and accepted as final by the district court, clearly support the finding of the Deputy Commissioner that, for the purpose of workmen's compensation, Valak's death arose out of and in the course of his employment. From the general circumstances surrounding his employment, the maintenance and supervision of the recreational facilities by the employer, and the employer's responsibility to safeguard life within and around the recreation

center, there was a sufficient justification for determining that Valak's death was incident to his employment and that it therefore arose out of and in the course of such employment.

Employment at an island base thousands of miles removed from the homeland necessarily creates unusual conditions in which the relation between employer and employee undoubtedly covers a far greater area than under ordinary conditions. Accordingly, in the present situation, because the island lacked recreational facilities which would have normally been available to its employees in the continental United States, the employer provided a recreation center for their use. Although subject to the control of the Navy, the recreation center was maintained and under the immediate supervision of the employer (R. 41). The employer's Recreation Department provided a bus "as part of the recreation facilities" for the free transportation of its employees to and from the center (R. 53). All employees at the center were on the regular staff of the employer, including a recreation center manager, security police necessary to maintain order, first-aid personnel, life guards, cooks and waiters (R. 41–42).

Furthermore, it is reasonably clear from the rescue activities of the camp manager, medical officer, life guards, and other regular employees that the employer was charged with responsibility for the safety of persons in the area of the recre-

ation center and the waters surrounding the neighboring off-shore reefs (R. 45–48, 50, 51). As we have seen (*supra,* pp. 3–4), it was these employees, on duty at the time of the emergency, who organized a rescue party after Valak's unsuccessful rescue attempt (R. 48, 51, 65). It is also significant in this connection to note that the first-aid supervisor, made available by the employer to care for the people injured in the area of the recreation center, left his other duties upon being notified that people were endangered in the surrounding waters (R. 45).

Thus, the evidence abundantly justified an inference that Valak's death occurred incident to his employment.

B. *The Deputy Commissioner's finding had a reasonable basis in law.*—Since Valak was acting within the scope of his employment while using the recreation facilities provided, and since his death occurred when he responded to an emergency probably within the compass of his employer's interest while so occupied, a reasonable basis in law for the Deputy Commissioner's finding that Valak's death arose out of and in the course of his employment is clearly present.

Providing organized recreation for employees yields undeniable benefits to management. The value of furnishing organized recreation during the work-day rest period so as to avoid undue fatigue and enable employees to maintain work at a high level has long been recognized. Moore,

Psychology for Business and Industry (2d ed. 1942) 415; Smith, *Handbook of Industrial Psychology* (1944) 80. Similarly, what an employee does in his off-work hours obviously determines to a large extent his efficiency on the job the next day. It is this factor which accounts for the increasing awareness throughout industry today of the value of the varied types of employer-promoted recreational programs. In addition to being frequently conducive to beneficial publicity and, hence, improved consumer goodwill, the employer's chief interest in providing recreational facilities and supervising their use is to improve employee morale and efficiency. See Diehl and Eastwood, *Industrial Recreation, Its Development and Present Status* (1940) 9; Duggins and Eastwood, *Planning Industrial Recreation* (1941) 11.

These indirect, but tangible, advantages accruing to the employer, have naturally led the courts to hold that employer sponsorship of recreational programs is "a matter of business, not of charity or benevolence" (*Holst* v. *New York Stock Exchange*, 252 App. Div. 233, 234), and that use of recreational facilities provided by the employer accordingly constitutes an incident of employment. *Ott* v. *Industrial Comm.*, 83 Ohio App. 13; *Fagan* v. *Albany Evening Union Co.*, 261 App. Div. 861.[3]

[3] Whether the connection between the employment and recreational activity is direct or indirect, the fact that corporate directors are not authorized to expend corporate money for non-corporate purposes confirms the view that an

Where the employee was required to participate in the recreational activity (*Stakonis* v. *United Advertising Corp.*, 110 Conn. 384; *Milwaukee* v. *Industrial Comm'n.*, 160 Wis. 238); where his employment contemplated such participation (*Adams* v. *East Pennsylvania Conf.*, 49 Pa. D. & C. 61); where the employer sponsored and supervised the activity (*Le Bar* v. *Ewald Bros.*, 217 Minn. 16); where the games were played on the employer's premises during the lunch hour so regularly as to imply consent and encouragement of the employer (*Brown* v. *United Services for Air, Inc.*, 298 N. Y. 901; *Thomas* v. *Manufacturing Co.*, 104 Kan. 432; *Bowen* v. *Saratoga Springs Comm'n.*, 267 App. Div. 928); or where the activity was one from which the employer derived a direct business benefit,[4] the activity has been deemed to be an incident of employment.

In the instant case, the direct ties between the recreational program and the employment relation clearly establish that the use by Valak of the recreational facilities was an incident of his

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employer would not provide recreational facilities and pay for their supervision, if there were no benefit to the company. If the recreational activities do not benefit the corporation, there is no corporate reason or authority to provide them. *Holst* v. *New York Stock Exchange*, 252 App. Div. 233.

[4] *Linderman* v. *Cownie Furs*, 234 Iowa 708 (salesman drowned on fishing trip given by employer as reward in winning sales contest which had been designed to stimulate employees to greater efforts so that corporate sales would increase); see, also, *Sinclair* v. *Wallach Laundry*, 252 App. Div. 715.

employment. These facilities were provided and maintained by the employer for its personnel (R. 40). The employer encouraged use of those facilities, even to the extent of furnishing free transportation to the recreation center (R. 9). The center, and its facilities, were supervised by the employer, through its permanent employees who were regularly assigned the full time duty of supervising the facilities and maintaining order at the center (R. 42). Moreover, coupled with these direct ties between the employment relation and the recreational program, was the clear advantage to the employer in improving employee efficiency and morale by providing recreational diversions not otherwise available at an isolated island base thousands of miles from the United States. In using the facilities so provided, there can be no serious question that Valak sought recreation as an incident of his employment, just as a seaman would do who is otherwise held to the monotony of a ship or a soldier held to that of an isolated mountain camp. *Murphey* v. *United States*, 179 F. 2d 743, 745 (C. A. 9).

There can also be no doubt that an employee's injury arising out of his participation in such recreation must be considered as arising out of and in the course of his employment for the purposes of eligibility for workmen's compensation benefits. In this respect, his injuries are viewed no differently from those arising out of any other incident of his employment. His eligibility is

not to be measured by the extent of his master's dereliction, nor by any inquiry as to whether, at the time of the injury, he was actively and directly advancing his employer's interests. "The basic thing" is that an incident of his employment places the employee in a position where he is surrounded with the conditions giving rise to the injuries. *Hartford Accident & Indemnity Co.* v. *Cardillo,* 112 F. 2d 11, 14 (C. A. D. C.) (per Mr. Justice Rutledge), certiorari denied, 310 U. S. 649; see *Leonbruno* v. *Champlain Silk Mills,* 229 N. Y. 470 (per Mr. Justice Cardozo). Consequently, if an injury occurs not because the employee was merely engaging in a recreational activity, but because he was engaging in it as an incident of his employment, the injury must be viewed as arising out of the course of his employment.

Respondents concede that Valak's use of the recreational facilities was an incident of his employment and that had his injury or death occurred while using such facilities it would have arisen out of and in the course of his employment so that "his mother would be entitled to the benefits of the Longshoremen's and Harbor Workers' Act."[5] They urge, however, that Valak's death actually took place not while he was using the recreational facilities, but while he was attempting an emergency rescue. That rescue,

[5] Brief filed by respondent in the Court of Appeals, p. 6.

it is contended, was a purely personal act unrelated to the use of the recreational facilities and therefore constituted a sufficient departure from that use to prevent his subsequent death from arising out of and in the course of his employment.[6]

This contention completely ignores the fundamental principle of workmen's compensation laws that performance by an employee of a personal act when injured cannot, by itself, deprive him of compensation benefits. Many acts of a personal nature are obviously normal incidents of employment. For, even though an employee deviates from his main assignment to fulfill some purely personal need, the deviation itself constitutes an incident of employment, provided the employee's personal act is reasonably in accordance with the normal and expected reaction to the situation. If the employee acts in a normal

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[6] Running through the opinion of the court below is the thought that Valak violated a company rule by entering the off-shore waters in which swimming was prohibited (R. 64–65). While it is true that Valak was forbidden by the regulations to swim anywhere except in the recreation center pool, it is obvious that Valak was not swimming for pleasure when he went to rescue the person signalling for help. His endeavor to effect that rescue was no more a violation of the company prohibition against pleasure swimming in the off-shore areas, than were the similar attempts later made by the official rescue party organized by the camp manager and superintendent. Furthermore, as the court below itself has observed in another Longshoremen's Act case, "disobedience of orders of the employer" does not, by itself, warrant denial of compensation under that Act. *Burns Steamship Co.* v. *Pillsbury*, 175 F. 2d 473.

manner, and as any human being may be expected to act in a given situation, there is no justification for placing him outside the protection of the workmen's compensation acts. Thus, injuries sustained while getting fresh air (*Von Ette's Case,* 223 Mass. 56; *Moschinger* v. *Heide, Inc.,* 256 App. Div. 1019), smoking (*Puffin* v. *General Electric Co.,* 132 Conn. 279; *Whiting-Mead Co.* v. *Ind. Acc. Com.,* 178 Cal. 505), eating (*Vilter Mfg. Co.* v. *Industrial Comm.,* 192 Wis. 362), drinking (*Goodyear Aircraft Corp.* v. *Industrial Com.,* 62 Ariz. 398, 415), using a telephone (*Cox's Case,* 225 Mass. 220, 222; *Holland, etc., Sugar Co.* v. *Shraluka,* 64 Ind. App. 545, 550), or a toilet (*Haskin's Case,* 261 Mass. 436), and obtaining war bonds (*Bethlehem Steel Co.* v. *Industrial Accident Commission,* 70 Cal. App. 2d 382), have been held compensable as arising out of and in the course of employment.

For the same reasons, an employee injured while responding naturally to the common-sense requirements of an emergency situation does not forfeit his right to compensation benefits. Accordingly, even where no direct interest of the employer was involved, benefits were not denied in the case of a driver who had picked up a child injured on a highway by someone else, and was struck and killed by a passing automobile while carrying the child. It is obvious that "giving aid to an injured child on the highway is just as natural and is just as much to be expected

from a driver of another vehicle as * * * stopping to get liquid refreshment for himself." *Puttkammer* v. *Industrial Comm.*, 371 Ill. 497, 503.

In any event, if Valak was also serving his employer's interest when he met his death, there can be even less doubt of the correctness of the Deputy Commissioner's determination. Certainly, where an employee's response to an emergency call, while motivated by humanitarian purposes, at the same time serves an interest of his employer, the propriety of holding such an employee's injuries compensable is plain. Whenever an interest of the employer is deemed to be involved, injury to the employee while responding to the emergency, even though his conduct is outside the normal scope of his duties, is uniformly held to arise out of and in the course of his employment for the purpose of the workmen's compensation laws. *Baum* v. *Industrial Commission*, 288 Ill. 516; *Howell* v. *Craig Colony and State Insurance Fund*, 255 App. Div. 908; *Mobile Liners, Inc.* v. *McConnell*, 220 Ala. 562; *Belle City Malleable Iron Co.* v. *Rowland*, 170 Wis. 293; *Southern Surety Company* v. *Stubbs*, 199 S. W. 343 (Tex. 1917); *Munn* v. *Industrial Board*, 274 Ill. 70; *Johnson* v. *Chicago & N. W. Ry. Co.*, 69 S. D. 111; *Van Ness* v. *Borough of Haledon*, 136 N. J. L. 623; *Travelers Insurance Company* v. *Dudley*, 180 Tenn. 191.

As we have indicated, Valak's action here may well be deemed to have served his employer's interests. The employer was probably charged

with the responsibility for safeguarding life within and around the area of the recreation center *supra*, pp. 18–19. Thus, Valak met his death by performing a duty resting upon the employer, even though that duty was normally discharged through other employees. Since Valak was serving his employer's interest, there was obviously a reasonable legal basis for the Deputy Commissioner's finding that Valak's death arose out of and in the course of his employment.

Such a reasonable basis is, as has been pointed out above, all that is necessary to sustain the finding as a matter of law. The only inquiry before the reviewing court is "not whether the principles of law applied by the Deputy Commissioner are correct, but merely whether they are forbidden by law or without any reasonable legal basis." *Hurley* v. *Lowe*, 168 F. 2d 553, 555 (C. A. D. C.), certiorari denied, 334 U. S. 828.[7]

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[7] Since the reviewing court's inquiry is limited to the reasonableness, rather than the rightness, of the legal principle invoked by the Deputy Commissioner, it is immaterial that there may be some cases opposed to that principle. Thus, even if the cases relied on by the court below (R. 65) (*Northwestern Pacific R. Co.* v. *Ind. Acc. Com.*, 174 Cal. 297; *Sichterman* v. *Kent Storage Co.*, 217 Mich. 364; *Pillsbury* v. *Liberty Mutual Insurance Co.*, 143 F. 2d 807 (C. A. 9)), were at odds with the conclusion of the Deputy Commissioner, they would simply reflect a difference of opinion, which does not, of course, establish the unreasonableness of the principle applied by the Deputy Commissioner. These decisions, however, are not in conflict with the administrative determination here. The *Northwestern* and *Sichterman* cases involved acts

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the cause remanded with directions that the judgment of the district court be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

MORTON LIFTIN,
MORTON HOLLANDER,
Attorneys.

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of kindness, not urgent action demanded by an emergency. Indeed, the California Supreme Court has expressly refused to follow the *Northwestern* case where an emergency was involved. *Zolkover* v. *Ind. Acc. Com.*, 13 Cal. 2d 584, 587. And the Michigan Supreme Court, in following its *Sichterman* case, justified its action by pointing out that "no emergency" was involved and that the person being assisted was not "in any danger." *Feiber* v. *Leonard, Ralph & Jones*, 284 Mich. 381. Moreover, there was no indication in the *Northwestern* and *Sichterman* cases that the employee, in performing the act, was serving his employer's interests. *Pillsbury* v. *Liberty Mutual Insurance Co.* involved an employee injured "during his Sunday evening stroll after dinner" in Oakland, California, where he was awaiting transportation to a defense base in the Hawaiian Islands.

APPENDIX

1. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U. S. C. 901 *et seq.*) provides in part:

SEC. 2. DEFINITIONS.—When used in this Act—

* * * * *

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

* * * * *

SEC. 3. COVERAGE.—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

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SEC. 19. PROCEDURE IN RESPECT OF CLAIMS.—(a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the

District of Columbia if the injury occurred in the District). * * *

2. The Defense Bases Act (Act of August 16, 1941, as amended, 56 Stat. 1035, 42 U. S. C. 1651 *et seq.*) provides in part:

* * * * * *

That (a) except as herein modified, the provisions of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any employee engaged in any employment—

(1) at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government; or

(2) upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone); or

(3) upon any public work in any Territory or possession outside the continental United States (including Alaska; the Philippine Islands; the United States Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone), if such employee is engaged in employment at such place under the contract of a contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) with the United States; but nothing in this paragraph shall be construed to apply to any employee of such

a contractor or subcontractor who is engaged exclusively in furnishing materials or supplies under his contract;

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irrespective of the place where the injury or death occurs, and shall include any injury or death occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof.

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